Supreme Court, U.S.
FILED

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No. ____ CLERK

In The

Supreme Court of the United States

October Term, 1996

CITY OF CHARLOTTE, NORTH CAROLINA,

Cross-Petitioner,

vs.

DARRELL A. PRICE, DAVID H. HOLLAND, ROBERT A. HOLL, OSWALD D. HOLSHOUSER, RAYMOND T. CARLTON, S. VANCE ELSTROM, and MARK E. CORWIN,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE PLAINTIFFS, WHO DID NOT CONTEND THAT THEY WOULD HAVE BEEN PROMOTED EVEN IN THE ABSENCE OF A CONSTITUTIONAL VIOLATION, LACKED STANDING TO ASSERT A CLAIM FOR DAMAGES FOR EMOTIONAL DISTRESS.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent/Cross-Petitioner City of Charlotte, North Carolina, conditionally cross-petitions the Court pursuant to Supreme Court Rule 12.5 to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, to review that Court's decision filed September 3, 1996, upholding the district court's denial of Respondent/Cross-Petitioner's motion for judgment as a matter of law pursuant to F.R.C.P. 50, and holding that the Petitioners/Cross-Respondents had standing to seek compensatory damages for emotional distress.

CITATIONS OF OPINIONS BELOW

The decision by the District Court is not reported. The decision of the Court of Appeals is reported at 93 F.3d 1241. An earlier opinion of the Court of Appeals which is not the subject of the requested writ is reported at 10 F.3d 207.

BASIS FOR JURISDICTION

The Court of Appeals rendered its Opinion on September 3, 1996. Petitioners/Cross-Respondents timely moved for a rehearing. The Court of Appeals denied the Petition for Rehearing on September 30, 1996. Petitioners/Cross-Respondents filed a Petition for a Writ of Certiorari with this Court, which was docketed on December 16, 1996. This Cross-Petition for a Writ of Certiorari relies upon Supreme Court Rule 12.5. This Court

has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(a):

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24 and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for the vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and

statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Amendment XIV, § 1, Constitution of the United States:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action brought by nine white police officers employed by the Respondent/Cross-Petitioner City of Charlotte, North Carolina (hereafter "City") under 42 U.S.C. § 1983, challenging the practices of the City for promotion to sergeant in the City of Charlotte Police Department. Petitioners/Cross-Respondents (hereafter "Plaintiffs") asserted that the promotional practices, in particular as embodied in a series of promotions taking effect in February of 1991, constituted illegal racial discrimination and violated the Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. None of the Plaintiffs whose claims are at issue here contended at trial that he would have been promoted in any event in the absence of consideration of race.[1]

[1] Two other Plaintiffs in the original action were promoted during the course of the litigation, Ronald Hayes and Randy

In February of 1991, the City promoted twenty-one (21) officers to the position of sergeant in the Charlotte Police Department. Of these, 17 were white and four were African-American. The promotions were made generally in accordance with a rank order roster developed after testing prescribed by an internal policy of the Charlotte Police Department. The exceptions to rank order promotions were for disciplinary reasons, a personal request of one officer and the consideration of race. African-American officers ranking numbers 11, 29, 62 and 74 were promoted. White officers ranking 1-7, 9-15 and 17-20 were also promoted. The white officer with rank number 8 was not promoted because of his disciplinary record, and the white officer with rank number 16 was not promoted because of his personal request. The seven Plaintiffs whose jury awards are at issue here were ranked as follows: 32, Darrell A. Price; 33, Robert A. Holl; 41, Oswald D. Holshouser; 47, David H. Holland; 50, S. Vance Elstrom; 54, Mark E. Corwin; and 57, Raymond T. Carlton.

The seven Plaintiffs listed above did not contend at trial that they would have been promoted in the absence of the City's consideration of race in the challenged promotion decisions. They did, however, contend that they were entitled to compensatory damages composed of damages for emotional distress as a result of the equal protection violation previously found by the district court and affirmed by the Court of Appeals on a previous

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Hagler. The judgments for compensatory damages in favor of these Plaintiffs were not appealed by the City.

appeal; i.e., the use of race as a factor in the promotional decisions made in February of 1991.

The District Court granted the Plaintiffs' motion for partial summary judgment on the issue of liability on the ground that the City's consideration of race in the challenged promotions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This determination of liability had been upheld by the Court of Appeals in an earlier appeal reported at 10 F.3d 207.

Following a remand from the Court of Appeals, the City filed a motion for partial summary judgment. Among other issues, the City asserted that the seven Plaintiffs who would not have been promoted in the absence of the constitutional violation could not be entitled to individual relief in the form of damages for emotional distress. The District Court entered an order denying this motion. The case was thereafter tried before a jury on issues of individual relief. An issue was submitted as to each of the seven Plaintiffs of whether they were entitled to damages for emotional distress as a result of the City making promotion decisions on race. The jury was instructed as to damages for emotional distress for each of these Plaintiffs, and awarded $3,000.00 for damages for emotional distress to each of the Plaintiffs. The City moved for judgment as a matter of law pursuant to F.R.C.P. 50 at the close of the Plaintiffs' evidence, and again at the close of all of the evidence.

Following the entry of judgment, the City renewed its motion for judgment as a matter of law by written motion as to the issues found in favor of the seven

Plaintiffs who made no contention that they would have been promoted in the absence of the consideration of race. The district court denied this motion, and the City appealed to the Fourth Circuit Court of Appeals both as to the final judgment and as to the order denying its renewed motion pursuant to Rule 50(b).

The Court of Appeals, in an opinion dated September 3, 1996, affirmed the ruling of the district court that the seven Plaintiffs who would not have been promoted in any event had standing to seek compensatory damages for emotional distress, and therefore stated a claim for relief for damages for emotional distress. (Petitioners' App. at pp. 9-16).[2] The Court of Appeals did, however, uphold the alternative ground of the City's appeal; i.e., that the Plaintiffs failed to offer sufficient proof of emotional distress proximately resulting from the constitutional violation. (Petitioners' App. at pp. 18-35). Accordingly, the Court of Appeals reversed the award of compensatory damages in favor of the seven Plaintiffs, and awarded to each of them one dollar in nominal damages. (Petitioners' App. at p. 35).

The Plaintiffs, through a petition for a writ of certiorari docketed in this Court on December 16, 1996, sought review of the determination by the Court of Appeals that they failed to offer sufficient proof of emotional distress to support the jury awards in their favor.[3]

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[2] Pursuant to Supreme Court Rule 12.5, the Court of Appeals opinion and other materials from the Petitioners' appendix is not reproduced here. Citations to the appendix are to the appendix included with the Petition in Case No. 96-962.

[3] This petition bears Case No. 96-962.

The City seeks review of the holding by the Court of Appeals that the Plaintiffs had standing to seek compensatory damages for emotional distress by means of this cross-petition for a writ of certiorari pursuant to Superior Court Rule 12.5.

The basis for federal jurisdiction in the District Court was founded upon 28 U.S.C. § 1331 and 1343, this being an action arising under the constitution and laws of the United States, specifically the civil rights statute of 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Misapplied Supreme Court Precedent Concerning Standing To Seek Injunctive Relief To Redress An Equal Protection Violation In Holding That The Plaintiffs Have Standing To Seek Damages For Emotional Distress.

The Court of Appeals opinion below is the only case in the entire body of federal jurisprudence that has ever held that a plaintiff who establishes an equal protection claim of exclusion from consideration for a benefit has standing to seek damages for emotional distress where the plaintiff failed to obtain the benefit for reasons unrelated to the constitutional violation. In reaching this conclusion, the Court of Appeals misconstrued Supreme Court precedent holding that such a plaintiff may have standing to seek prospective injunctive relief. No decision of this Court, or any other federal court, has ever held that a plaintiff in similar circumstances also has standing to seek damages for emotional distress. The Court of

Appeals decision opens the door to a huge class of claims for emotional distress that heretofore did not even exist. This Court should therefore grant certiorari to rectify the misguided decision of the Court of Appeals on the important federal question of what prerequisites are necessary for such a plaintiff to have standing to seek damages for emotional distress.

It is established law that a jury may award damages for emotional distress under 42 U.S.C. § 1983 provided that there is proof of injury actually caused by the violation. *See Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052, 55 L.E.2d 252, ___ (1978). The level of damages, including damages for emotional distress, is customarily determined according to common law tort principles. *Memphis Community School District v. Stachura*, 477 U.S. 299, 305-09, 106 S.Ct. 2537, 2542-44, 91 L.Ed.2d 249, ___ (1986). *See also, Heck v. Humphrey*, 512 U.S. 477, ___, 114 S.Ct. 2364, 2370-71, 129 L.Ed.2d 383, ___ (1994).

Likewise, it is clearly established that persons in the position of Plaintiffs here who would not have been promoted in any event have standing to seek injunctive relief to ensure that they may compete for all future promotions without consideration of racial criteria. The City did not contest the issue of standing on behalf of the Plaintiffs related to prospective declaratory and injunctive relief. Such standing may be inferred from the following passage from footnote 14 of this Court's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n. 14, 98 S.Ct. 2733, 2743, n. 14, 57 L.Ed.2d 750, ___ (1978):

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 243 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. *The question of Bakke's admission vel non is merely one of relief.* (emphasis added)

This Court has recently reaffirmed the principle of standing found in *Bakke* in the context of minority set-asides for bidding on construction contracts. *Northeastern Florida General Contractors v. City of Jacksonville, Florida*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1994); *Adarand Constructors, Inc. v. Pena*, ___ U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Both *Northeastern* and *Adarand* held that the unsuccessful bidders suffered an "injury in fact" sufficient to convey standing under *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), by virtue of a denial of equal treatment resulting from the erection of a barrier to compete for the benefit. In each case, however, the injury expressly was considered not to be the ultimate inability to obtain the sought-after benefit. *Northeastern*, 508 U.S. at 666, 113 S.Ct. at 2303, 132 L.Ed.2d at ___; *Adarand*, ___ U.S. at ___, 115 S.Ct. at 2104, 124 L.Ed.2d at ___.

Bakke, Northeastern and *Adarand* establish the principle that plaintiffs who have suffered an equal protection violation have the right to seek declaratory injunctive relief in order to compete in the future on a level playing field: they do *not* establish a right to seek damages for emotional distress where such plaintiff would not have gained the benefit even in the absence of the constitutional violation. The Court of Appeals below, however, held that "[t]hese precedents (*Bakke, Northeastern* and *Adarand*) also hold that Appellees (Plaintiffs) may be entitled to compensatory damages for emotional distress, the precise type of injuries claimed here." (Petitioners App. at pp. 15-16). This characterization of the Supreme Court precedents is plainly wrong. The issue of compensatory damages for emotional distress was not addressed in any of these cases. Furthermore, the holding that the Plaintiffs may seek damages for emotional distress is contrary to principles of standing established in other Supreme Court cases.

The "injury in fact" necessary under *Warth v. Seldin* and its progeny is the denial of the opportunity to compete for the benefit in the future on an equal basis. The "injury in fact" necessary to confer standing to seek relief in the form of damages is for harm already caused by constitutionally impermissible treatment. A plaintiff may have standing to seek one type of relief, but not the other. *C.f., City of Los Angeles v. Lyons*, 461 U.S. 95, ___, 103 S.Ct. 1660, 1666-67, 75 L.Ed.2d 675, ___ (1983) (a civil rights plaintiff found to have standing to seek damages but to lack standing to seek declaratory relief absent a showing that the conduct that injured him was likely to recur). Here, the issue of standing is a mirror image of *Lyons*.

While these plaintiffs had standing to seek declaratory relief, there was no injury to them entitling them to damages. The reason for this dichotomy is that the result – failure to obtain the promotion benefit – would have been the same even if the constitutional violation had not occurred.

The principle of standing applicable here is founded upon tort law concepts of causation for injury adopted in this Court's *Carey* and *Memphis School District* decisions, *supra*. Here, the constitutional violation – use of a racial criterion – was not a proximate cause of the City's decision not to promote these Plaintiffs.[4] In holding that these Plaintiffs have standing to go before a jury to seek more than nominal damages, the Court of Appeals decision also allows plaintiffs in similar cases to seek compensation not for injuries "caused" by a constitutional violation, but rather for the "value" of the right that was infringed. The *Stachura* decision, referring to this Court's holding in *Carey*, makes precisely this distinction: "*Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages." *Memphis Community School District v. Stachura*, 477 U.S. 299, 308, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249, ___ (1986). This Court in *Stachura* further noted "that nominal damages, and not damages based on some undefinable 'value' of infringed rights are the appropriate means of 'vindicating' rights whose deprivation has not caused actual,

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[4] The Court of Appeals noted as to one group of Plaintiffs that their "emotional distress" was evidently the failure to be promoted, rather than any invidious discrimination. (Petitioners' App. at pp. 33-35).

provable injury. . . . " 477 U.S. at 308, n. 11, 106 S.Ct. at 2543-44, n. 11, 91 L.Ed.2d 249 at ___. Here, there is no conceivable basis upon which any substantial compensatory damages could have been awarded to the Plaintiffs because there was no causal link between the constitutional violation itself and any emotional distress proximately resulting from it.

As this Court noted in *Carey*, "the elements and prerequisites for recovery of damage appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." 435 U.S. at 263, 98 S.Ct. at 1053, 55 L.Ed.2d at ___. This is a case where recovery of damages for emotional distress is not an appropriate measure of compensation for these Plaintiffs, who had no claim to the benefit they sought even in the absence of the constitutional violation. The decision of the Court of Appeals below is a misreading of this Court's *Bakke*, *Northeastern* and *Adarand* decisions, and constitutes an unwarranted extension of these cases beyond the realm of injunctive relief. It opens the door for a wide variety of plaintiffs to seek "the abstract value of a constitutional right" rather than an appropriate remedy tailored to the actual circumstances of the constitutional deprivation.

B. The Decision Of The Court Of Appeals Below Conflicts With *Consolidated Rail Corp. v. Gottshall.*

The holding by the Court of Appeals is fundamentally irrational: It is based upon a concept that damages may be awarded without causation. This Court has recently held in *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) that damages for emotional distress must be limited in a meaningful way. Otherwise, defendants may face the prospect of unpredictable and nearly infinite liability. The Court of Appeals decision raises the specter of such unpredictable and nearly infinite liability for defendants in a variety of circumstances.

In *Gottshall,* this Court addressed the issue of the proper standard for evaluating claims of negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq.* This Court adopted the common law "zone of danger" test for such claims under the FELA. In so doing, it noted an overriding concern that the class of plaintiffs and types of harm for which plaintiffs may recover damages for emotional distress should be limited in order to deal with the "significant problem" of "the prospect that allowing such suits can lead to unpredictable and nearly infinite liability for defendants." ___ U.S. at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at ___. This concern applies with equal force to civil rights claims under § 1983.

The logical implication of permitting standing to these Plaintiffs to seek damages for emotional distress is

not limited to the prospect that every non-minority candidate on the promotion roster could have sued and potentially recovered damages. It also means, for example, in a case such as *Bakke* that every rejected non-minority applicant to a university program can go before a jury and seek such damages. Furthermore, in a case such as *Northeastern* or *Adarand*, every non-minority contractor who could have bid on a contract subject to a minority set-aside program can pursue a damage remedy. Other examples of such potentially unbridled liability easily come to mind, involving both minority and non-minority plaintiffs.

The absurdity of the very concept of damages for emotional distress in this situation illustrates the point that the remedy is inappropriately tailored to the particular constitutional right that was infringed. The mandate of *Carey* is that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question. . . . " 435 U.S. at 259, 98 S.Ct. at 1050, 55 L.Ed.2d at ___. The Plaintiffs here obtained appropriate declaratory and injunctive relief to redress their injury. Any recovery of damages for emotional distress would be an inappropriate windfall for plaintiffs such as these. This Court should grant certiorari to establish that plaintiffs in equal protection cases who would not have obtained the benefit sought in the absence of unequal treatment may seek declaratory and injunctive relief, but may not make claims for compensatory damages for emotional distress. Unless this requested writ is granted, a host of defendants will face the "unpredictable

and nearly infinite liability" for claims for emotional distress decried by this Court in its *Gottshall* decision.

This the 14th day of January, 1997.

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